Supreme Court, U.S.
FILED

96 320 AUG 29 1996

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHEILA L. BIRNBAUM*
BARBARA WRUBEL
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
**Counsel of Record*

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

RICHARD K. BERNARD
METRO-NORTH COMMUTER
RAILROAD COMPANY
347 Madison Avenue
New York, New York 10017
Of Counsel

77 pp

QUESTIONS PRESENTED

1. Whether the Second Circuit erred in ruling that mere exposure to a potentially harmful substance, in the absence of any physical injury, is a sufficient basis for recovery under the Federal Employers' Liability Act ("FELA"), a ruling that, as the Second Circuit acknowledged, is in direct conflict with the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)?

2. Whether the Second Circuit erred in holding that under *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), the zone of danger test is satisfied in FELA cases where an employee alleges mere exposure over a period of time to a potentially hazardous substance, but where there is no claim of actual physical injury or risk or fear of immediate physical injury?

3. Whether the Second Circuit, in contravention of this Court's opinion in *Gottshall*, has improperly discarded the essential common law requirements imposed to place rational limits on liability for negligent infliction of emotional distress: namely, (i) proof of physical injury, (ii) evidence of physical manifestation of emotional harm, and (iii) proof of emotional distress that is severe and substantiated by objective medical, psychiatric or clinical evidence?

4. Whether the Second Circuit erred in ruling that FELA permits a totally asymptomatic plaintiff to recover damages for future medical monitoring costs, a ruling that is in direct conflict with FELA's express statutory requirement of "injury" as a prerequisite to recovery?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Metro-North Commuter Railroad Company, is a railroad corporation that is a subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York. *See* Metropolitan Transportation Act, N.Y. Pub. Auth. Law §§ 1260 to 1279-b (McKinney 1982 & Supp. 1996). Metro-North Commuter Railroad Company does not have any subsidiary companies.

Respondent Michael Buckley is an individual.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 3

I. IN HOLDING THAT AN ASYMPTOMATIC PLAINTIFF WHO WAS EXPOSED TO ASBESTOS MAY RECOVER UNDER FELA, THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT AND WITH THE OVERWHELMING WEIGHT OF COMMON LAW AUTHORITY 6

II. THE SECOND CIRCUIT MISINTERPRETED AND MISAPPLIED THE ZONE OF DANGER TEST ARTICULATED BY THIS COURT IN *GOTTSHALL* 12

III. THE SECOND CIRCUIT, IN DIRECT CONTRAVENTION OF *GOTTSHALL*'S MANDATE, DISCARDED WELL-ESTABLISHED COMMON LAW LIMITATIONS ON RECOVERY FOR EMOTIONAL DISTRESS 20

A. The Second Circuit Erred in Holding That No Physical Manifestation of Emotional Distress Is Required 21

B. The Second Circuit Incorrectly Held That Emotional Distress Is Compensable Even If It Is Not Severe 23

C. The Second Circuit Erred by Not Requiring Medical or Psychiatric Evidence of Emotional Distress 25

IV. THE SECOND CIRCUIT ERRED IN ALLOWING AN ASYMPTOMATIC PLAINTIFF TO RECOVER MEDICAL MONITORING DAMAGES, IN DIRECT CONFLICT WITH FELA'S STATUTORY "INJURY" REQUIREMENT 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES *PAGE(S)*

Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) 8, 18

Amendola v. Kansas City Southern Railway, 699 F. Supp. 1401 (W.D. Mo. 1988) 7, 22, 23

Anselmi v. Penrod Drilling Corp., 813 F. Supp. 436 (E.D. La. 1993) 16

Asaro v. Cardinal Glennon Memorial Hospital, 799 S.W.2d 595 (Mo. 1990) 15

In re Asbestos Products Liability Litigation (No. VI), CA No. 2 MDL 875, 1996 WL 239863 (E.D. Pa. May 2, 1996) 8, 9, 10, 27

Atchison, Topeka & Santa Fe Railway v. Buell, 480 U.S. 557 (1987) 21, 22, 24

Aurora v. Burlington Northern Railroad, 31 F.3d 724 (8th Cir. 1994) 25

Ball v. Joy Manufacturing Co., 755 F. Supp. 1344 (S.D. W.Va 1990), *aff'd*, 958 F.2d 36 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992) . . . 29

Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992 8

Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) 25, 26

Batko v. Ogilvie, No. 85 C 7873, 1986 WL 5761 (N.D. Ill. May 9, 1986) 7, 28

Bianco v. Philadelphia, Bethlehem & New England Railroad, No. 93-4828, 1995 WL 89036 (E.D. Pa. Mar. 2, 1995) 17

Bloom v. Consolidated Rail Corp., 41 F.3d 911 (3d Cir. 1994) 19, 20

Bolden v. Southeastern Pennsylvania Transportation Authority, 21 F.3d 29 (3d Cir. 1994) 27

Bondy v. Texas Eastern Transmission Corp., 701 F. Supp. 112 (M.D. La. 1988) 8

Boucher v. Dixie Medical Center, 850 P.2d 1179 (Utah 1992) 15

Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) . . . 15

Bowen v. Lumbermens Mutual Casualty Co., 517 N.W.2d 432 (Wis. 1994) 24

Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987) 8

Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996) . . . 26

Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) 8

Carey v. Piphus, 435 U.S. 247 (1978) 27

Carroll v. Litton Systems, Inc., No. B-C-88-253, 1990 WL 312969 (W.D.N.C. Oct. 29, 1990) 29

Carroll v. State Farm Ins. Co., 427 So. 2d 24, 25 (La. Ct. App. 1983) 18

Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994) . . . . . *passim*

Corso v. Merrill, 406 A.2d 300 (N.H. 1979) 21

Crooks v. Metro-North Commuter Railroad, No. 93 Civ. 6030 (JSM), 1994 WL 719683 (S.D.N.Y. Dec. 28, 1994) 16

Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) 24

Deleski v. Raymark Industries, Inc., 819 F.2d 377 (3d Cir. 1987) 8

Doner v. Ed Adams Contracting, 617 N.Y.S.2d 565 (App. Div. 3d Dep't 1994) 8, 10

Dziegelewski v. Consolidated Rail Corp., No. 93 Civ. 2666, 1995 WL 63155 (S.D.N.Y. Feb. 15, 1995) 17

Eagle-Picher Industries v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) 8, 10, 11

Ellenwood v. Exxon Shipping Co., 795 F. Supp. 31 (D. Me. 1992), *aff'd in relevant part*, 984 F.2d 1270 (1st Cir.), *cert. denied*, 508 U.S. 981 (1983) 22

Falzone v. Busch, 214 A.2d 12 (N.J. 1965) 21

Flynn v. New York, N.H. & H. R. Co., 283 U.S. 53 (1931) 11

Garcia v. Burlington Northern Railroad, 904 P.2d 1085 (Or. Ct. App. 1995) 16

Garrett v. New Berlin, 362 N.W.2d 137 (Wis. 1985) 15

Gillman v. Burlington Northern Railroad, 878 F.2d 1020 (7th Cir. 1989) 16

Grube v. Union Pacific R.R., 886 P.2d 845 (Kan. 1994) 16

Gulf, Colorado & Santa Fe Railway v. Hayter, 54 S.W. 944 (Tex. 1900) 14

Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986) 12

Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993) 26

Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944 (Idaho 1980) 21

In re Hawaii Federal Asbestos Cases, 734 F. Supp. 1563 (D. Haw. 1990) 8, 10

Hughes v. Moore, 197 S.E.2d 214 (Va. 1973) 21

Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemicals Co., 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990) 24

Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) 10

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986) 11

Jobin v. McQuillen, 609 A.2d 990 (Vt. 1992) 16

Johnson v. Ruark Obstetrics & Gynecology Associates, 395 S.E.2d 85 (N.C. 1990) 24

K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995) . . 24

Kadans v. Citicorp Mortgage, Inc., No. 93-15583, 1994 WL 242112 (9th Cir. June 3, 1994) . . . 25

Keck v. Jackson, 593 P.2d 668 (Ariz. 1979) 15

Kimberley v. Howland, 55 S.E. 778 (N.C. 1906) . . . 14

Kohn v. Schiappa, 656 A.2d 1322 (N.J. Super. Law Div. 1995) 26

Lacy v. Cooper Hospital/University Medical Center, 745 F. Supp. 1029 (D.N.J. 1990) 24

Lavelle v. Owens-Corning Fiberglas Corp., 507 N.E.2d 476 (Ohio Ct. C.P. 1987) 12, 24

Leone v. Leewood Service Station, 624 N.Y.S.2d 610 (App. Div. 2d Dep't), *appeal denied*, 634 N.Y.S.2d 443 (1995) 26

Locke v. Johns-Manville Corp., 275 S.E.2d 900 (Va. 1981) 8

Mack v. South-Bound R. Co., 29 S.E. 905 (S.C. 1898) 14

McMillan v. National Railroad Passenger Corp., 648 A.2d 428 (D.C. 1994) 16

Mellon v. Goodyear, 277 U.S. 335 (1928) 11

Melton v. Allen, 580 P.2d 1019 (Or. 1978) 21

Mergenthaler v. Asbestos Corp. of America, 480 A.2d 647 (Del. 1984) 8

Miner v. City of Glen Falls, 999 F.2d 655 (2d Cir. 1993) 27

Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989) 24, 26

Nelson v. Web Water Development Association, Inc., 507 N.W.2d 691 (S.D. 1993) 21

Nutt v. A.C. & S., Inc., 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984) . . 17

Outten v. National Railroad Passenger Corp., 928 F.2d 74 (3d Cir. 1991) 16

Pankopf v. Hinkley, 123 N.W. 625 (Wis. 1909) 15

Parkway Co. v. Woodruff, 901 S.W.2d 434 (Tex. 1995) 24, 25

Parrish v. Omaha Public Power District, 496 N.W.2d 914 (Neb. 1993) 24, 26

Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982) 21

Plummer v. Abbott Laboratories, 568 F. Supp. 920 (D.R.I. 1983) 21

Poulsen v. Russell, 300 N.W.2d 289 (Iowa 1981) . . . 24

Purcell v. St. Paul City Railway, 50 N.W. 1034 (Minn. 1892) 14

Redland Soccer Club, Inc. v. Department of Army, 55 F.3d 827 (3d Cir. 1995) 8

Reilly v. United States, 547 A.2d 894 (R.I. 1988) . . . 21

Resavage v. Davies, 86 A.2d 579 (Md. 1952) 15

Rickey v. Chicago Transit Authority, 457 N.E.2d 1 (Ill. 1983) 15

Robb v. Pennsylvania Railroad, 210 A.2d 709 (Del. 1965) 15, 21

Roberts v. Saylor, 637 P.2d 1175 (Kan. 1981) 24

Robertson v. Geophysical Service, Inc., 469 So. 2d 22 (La. Ct. App. 1985) 24

Rodrigues v. State, 472 P.2d 509 (Haw. 1970) 24

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) . . . . . *passim*

Sears Roebuck & Co. v. Young, 384 So. 2d 69 (Miss. 1980) 21

Shelton v. Russell Pipe & Foundry Co., 570 S.W.2d 861 (Tenn. 1978) 15

Silver v. Mendel, 894 F.2d 598 (3d Cir. 1990) 25

Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996) . . 8

Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907) . 14

Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980) . . . 15

State ex rel. Woyke v. Tonka Corp., 420 N.W.2d 624 (Minn. Ct. App. 1988) 21

Stewart v. Arkansas Southern Railway, 36 So. 676 (La. 1904) 15

Thomas v. FAG Bearings Corp., 846 F. Supp. 1400 (W.D. Mo. 1994) 25, 29

Towns v. Anderson, 579 P.2d 1163 (Colo. 1978) . . . 15

Urie v. Thompson, 337 U.S. 163 (1949) 6, 7, 28

Vaillancourt v. Medical Center Hospital, 425 A.2d 92 (Vt. 1980) 21

Vance v. Consolidated Rail Corp., 652 N.E.2d 776 (Ohio 1995), *cert. denied*, 116 S. Ct. 776 (1996) 16

Watson v. Dilts, 89 N.W. 1068 (Iowa 1902) 15

Whetham v. Bismarck Hospital, 197 N.W.2d 678 (N.D. 1972) 15

Williams v. Baker, 572 A.2d 1062 (D.C. 1990) . . 15, 24

Williams v. Carnival Cruise Lines, 907 F. Supp. 403 (S.D. Fla. 1995) 22

Wilson v. Consolidated Rail Corp., 810 F. Supp. 411 (N.D.N.Y. 1993) 16

Wisniewski v. Johns-Manville Corp., 759 F.2d 271 (3d Cir. 1985) 8, 17

STATUTES *PAGE(S)*

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 27

45 U.S.C. § 51 . . . . . 1, 5, 7, 28

46 U.S.C. app. § 688(a) 7

OTHER AUTHORITIES *PAGE(S)*

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 19, 20, 22

Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982) 13

Restatement (Second) of Torts § 436A (1965) 22, 23, 24

Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992) 29

Irving J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* (1981) 10

Petitioner Metro-North Commuter Railroad Company ("Metro-North") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (A-1 to A-8) has not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (A-9 to A-28) is reported at 79 F.3d 1337.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1996, and Metro-North's timely petition for rehearing was denied on July 10, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, is reproduced as Appendix D.

STATEMENT OF THE CASE

This case arises from plaintiff Michael Buckley's exposure to asbestos-containing insulation while working for Metro-North as a pipefitter in Grand Central Terminal in New York. (A-2) Plaintiff seeks damages for negligent infliction of emotional distress and for future medical monitoring under FELA. (A-4) Plaintiff is the "test plaintiff" for a group of approximately 140 plaintifs with essentially identical claims against Metro-North. (A-13)

It is undisputed that plaintiff has no asbestos-related disease or physical injury and in fact shows no physical effect

of any kind from asbestos exposure.[1] (A-3; A-20) Moreover, it is undisputed that plaintiff is not likely to develop an asbestos-related disease. (A-19) At trial, plaintiff's expert in occupational environmental health hazards, Dr. William Nicholson,[2] quantified Buckley's increased risk of dying of cancer, as a result of his exposure to asbestos, as only between one and five percent. (TR at 334) Dr. Nicholson further testified that "a death from asbestosis is not something Mr. Buckley has to worry about, although he might develop shortness of breath." (TR at 325)

Plaintiff also does not suffer from any physical manifestation of his alleged emotional distress. Moreover, his alleged distress is not documented by any objective medical, psychiatric or clinical evidence of any kind. (A-7 to A-8) Plaintiff has never sought psychiatric treatment, or seen a social worker or a counselor for his alleged emotional trauma. (TR at 797) According to plaintiff's expert, Dr. Steven Markowitz,[3] plaintiff did not display a level of concern warranting counseling. (TR at 549; A-8)

At the close of plaintiff's case-in-chief, the district court (Hon. Whitman Knapp, U.S.D.J.) granted Metro-North's motion for a directed verdict. The court held that plaintiff's exposure to asbestos did not satisfy the common

---

[1] Plaintiff's amended complaint expressly states that he is "not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness" or for any such condition "which may occur in the future." *See* Plaintiff's Amended Complaint ¶ 19.

[2] Dr. Nicholson is a professor at the Mount Sinai School of Medicine, one of the world's leading research centers on asbestos and health. (Trial Transcript at 291, *Buckley v. Metro-North Commuter Railroad*, No. 89 Civ. 7170-A(WK) ("TR"))

[3] Dr. Markowitz is a professor at the Mount Sinai School of Medicine. (TR at 209)

law "zone of danger" test, which this Court has adopted as a limitation on recovery for negligent infliction of emotional distress under FELA. (A-4; A-6 to A-7 (citing *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994)). The court also found that plaintiff "offered no objective evidence by which a jury could determine that he had suffered a real emotional injury" (A-8) and that "there [was] no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable." (A-6)

The Second Circuit reversed, holding that plaintiff could recover for negligent infliction of emotional distress because his exposure to asbestos was a "physical impact" and, by itself, satisfied the *Gottshall* zone of danger test. (A-18 to A-19) The Second Circuit stated that plaintiff could recover even though he did not suffer severe emotional distress or psychiatric harm, showed no physical manifestation of emotional distress, and presented no competent psychiatric, medical or clinical evidence of emotional distress. (A-24 to A-25) Further, the Second Circuit held that, despite the absence of physical injury or a likelihood of future injury, plaintiff could recover medical monitoring damages under FELA. (A-26) On July 10, 1996, the Second Circuit denied Metro-North's petition for rehearing with suggestion for rehearing en banc. (A-30 to A-31)

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision in this case is, as the Second Circuit acknowledged, in direct conflict with a decision by the Third Circuit, *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). (A-20 to A-21) In *Schweitzer*, the Third Circuit held that exposure to asbestos, without asbestos-related physical injury, does not constitute a basis for recovery under FELA. 758 F.2d at 942. The overwhelming majority of federal and state decisions under both FELA and the

common law are in accord with *Schweitzer* in denying recovery in asbestos exposure cases where there is no physical injury, including cases where claims for emotional distress have been asserted. In contrast, the Second Circuit has drastically expanded liability under FELA by allowing an asymptomatic plaintiff to pursue claims for emotional distress and future medical monitoring costs, based on his mere exposure to asbestos.

The Second Circuit's decision also is fundamentally inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994). In *Gottshall*, this Court held that purely emotional distress is compensable under FELA only if it meets the common law "zone of danger" test. *See id.* at 2410-11. In determining that plaintiff's exposure over time to asbestos satisfied the zone of danger test, the Second Circuit wrenched the test out of its common law boundaries. Well-settled law has restricted the test to claims arising out of sudden accidents or other traumatic events, which threaten a plaintiff with *imminent* physical harm, thereby causing the plaintiff to suffer fright and to fear for his own safety. Contrary to the Second Circuit, recent FELA decisions by federal and state appellate courts make clear that these traditional elements are required under the *Gottshall* zone of danger test. Moreover, the Second Circuit's decision conflicts with decisions by the Fifth Circuit and other courts, which have held that under the common law asbestos exposure cases do not meet the zone of danger test because these traditional elements are absent. In fact, Metro-North has found no other decision applying the zone of danger test in this context.

In addition to misapplying the zone of danger test, the Second Circuit rejected all the other requirements that the common law imposes to place rational limits on liability for negligent infliction of emotional distress: namely, that a

plaintiff's distress be severe, result in a physical manifestation, and be established by competent medical, psychiatric or clinical evidence. The Second Circuit's rejection of these requirements is irreconcilable with this Court's pronouncement in *Gottshall* that under FELA courts are not free to discard such common law restrictions on "the specter of unlimited and unpredictable liability." *See id.* at 2411.

The combined effect of the Second Circuit's holdings is an unprecedented and unjustifiable expansion of liability for negligent infliction of emotional distress. Under the Second Circuit's decision, every railroad worker alleging mere exposure to asbestos or other potentially harmful substances may have a claim under FELA for emotional distress, including distress that is trivial, insubstantial, or evanescent. Such a result is contrary to the great weight of authority under both FELA and the common law.

Finally, the Second Circuit's holding that a claim for medical monitoring damages is cognizable under FELA despite the absence of any physical injury is directly contrary to the statute's express requirement of an "injury" as a precondition to recovery.[4] *See* 45 U.S.C. § 51. Moreover, it is contrary to the basic common law principle that there can be no cause of action in tort without an actual injury. As *Schweitzer* and other cases make clear, under FELA, "injury" from asbestos exposure exists, and a cause of action may be deemed to have accrued, only when an asbestos-related disease is present. Alleged "subclinical changes," without any impairment or disease, are just that: merely changes, not cognizable injuries. *See Schweitzer*,

---

[4] Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may later develop an asbestos-related physical injury. Therefore, his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

758 F.2d at 942; *cf. Urie v. Thompson*, 337 U.S. 163, 170 (1949) (worker exposed to silica dust is injured, and his cause of action accrues under FELA, only when adverse effects manifest themselves).

The Second Circuit's decision, if allowed to stand, will have extraordinary economic consequences upon railroads under FELA and as well as upon other entities, government and non-government, under other federal statutes and the common law. Although the Second Circuit attempted to limit its decision to "massive[ly]" exposed railroad workers (A-23), the decision will clearly be relied upon by untold numbers of other litigants in FELA, Jones Act, and common law cases for its expansive holdings. For these reasons and the reasons set forth below, Metro-North respectfully urges that this Court grant certiorari.

I. IN HOLDING THAT AN ASYMPTOMATIC PLAINTIFF WHO WAS EXPOSED TO ASBESTOS MAY RECOVER UNDER FELA, THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT AND WITH THE OVERWHELMING WEIGHT OF COMMON LAW AUTHORITY

The Second Circuit held in this case that mere exposure to asbestos, without any indication of disease or injury, can serve as a basis for recovery under FELA and the zone of danger test adopted by this Court in *Gottshall*. In so holding, the Second Circuit expressly "rejected the FELA cases finding that asbestos fiber inhalation cannot constitute an injury," including specifically the Third Circuit's decision in *Schweitzer*. (A-20 to A-21) The *Schweitzer* rule is identical to the common law of the overwhelming majority of jurisdictions. In abandoning that rule under FELA, the Second Circuit ignored this Court's admonition to adhere to the common law in deciding FELA cases. *See Gottshall*, 114 S. Ct. at 2404, 2410.

In *Schweitzer*, an asbestos case arising under FELA, the Third Circuit held that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer*, 758 F.2d at 942 (relying on *Urie*, 337 U.S. at 170, where this Court ruled that an employee exposed to silica dust "can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves"). Although *Schweitzer* is not an emotional distress case, the *Schweitzer* rule properly governs emotional distress claims arising from asbestos exposure. As discussed below at Point II, in the absence of physical injury, emotional distress claims are cognizable under FELA only when they meet the zone of danger test. The required elements of that test are not met in asbestos exposure cases, and therefore, physical injury remains a prerequisite to recovery.

The Second Circuit's refusal to apply the *Schweitzer* rule in this asbestos exposure case conflicts not only with *Schweitzer*, but with the overwhelming majority of asbestos exposure cases under FELA, the Jones Act,[5] and the common law, including cases where claims for emotional distress or fear of cancer have been asserted. For example, the court in *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401, 1407-11 (W.D. Mo. 1988), dismissed claims brought under FELA for mental anguish allegedly caused by asbestos exposure where there was no physical harm, noting that such a rule was necessary to "keep[] the floodgates intact." *See also Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761 (N.D. Ill. May 9, 1986) (dismissing FELA claims based on asbestos exposure

---

[5] The Jones Act incorporates Section 1 of FELA, 45 U.S.C. § 51. *See* 46 U.S.C. app. § 688(a).

where no current injury was alleged, citing *Schweitzer*); *In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No. 2 MDL 875, 1996 WL 239863 (E.D. Pa. May 2, 1996) (dismissing Jones Act and state law claims based on mere asbestos exposure). Likewise, the Third, Fourth, and Fifth Circuits have held that, under the common law, exposure to asbestos or other substances, without physical harm, cannot support a claim for negligent infliction of emotional distress. *See Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985); *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 38 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992); *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986).[6]

The application of the *Schweitzer* rule in emotional distress cases rests on the same principles and policy considerations that this Court identified in *Gottshall*. Specifically, this Court mandated in *Gottshall* that courts applying FELA must look to the common law's substantial limitations on recovery for purely emotional injuries. *See Gottshall*, 114 S. Ct. at 2405-07, 2410-11. The Second Circuit discounted the policies underlying these limitations and sought to minimize the effect of its ruling by noting

---

[6] *Accord Deleski v. Raymark Indus.*, 819 F.2d 377, 380 (3d Cir. 1987); *Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Eagle-Picher Indus., v. Cox*, 481 So. 2d 517, 528 (Fl. Dist. Ct. App. 1985), *review denied*, 492 So.2d 1331 (Fla. 1986); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192-95 (Ky. 1994); *Doner v. Ed Adams Contracting*, 617 N.Y.S.2d 565, 566 (App. Div. 1994); *Simmons v. Pacor Inc.*, 674 A.2d 232, 238-39 (Pa. 1996); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988), *aff'd*, 872 F.2d 422 (9th Cir. 1989); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904 (Va. 1981).

that "only a narrow class of plaintiff may sue under FELA." (A-22 (citing *Gottshall*, 114 S. Ct. at 2412 (Ginsburg, J., dissenting))) In so doing, the Second Circuit ignored this Court's admonition in *Gottshall* that the need to carefully limit liability exists "as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers." *See Gottshall*, 114 S. Ct. at 2409.

As the Third Circuit observed in *Schweitzer*, allowing recovery based on exposure alone would create limitless liability:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

758 F.2d at 942. The *Schweitzer* court concluded that "[r]equiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Id.*

Similarly, United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently dismissed the Jones Act and state law claims of 261 plaintiffs who alleged exposure to asbestos but had proffered no evidence of asbestos-related physical injury. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *5. Judge Weiner observed that the "judicial system has been faced with an onslaught of personal injury, asbestos cases for more than twenty years." *Id.* at *2. Citing the policy concerns set forth in *Schweitzer*, Judge Weiner emphasized that plaintiffs who

actually have asbestos-related diseases "suffer while the [c]ourt [system] is clogged" with filings by exposed plaintiffs who (like plaintiff here) have no asbestos-related injuries. *Id.* at *5.

In place of the *Schweitzer* rule, the Second Circuit announced a rule that purports to limit recovery to "unusual" cases of "lengthy" and "massive" asbestos exposure. (A-23) The terms "lengthy" and "massive" provide an inherently imprecise and unworkable standard; they are vague and without definition in the scientific and medical literature on asbestos and health. Furthermore, the Second Circuit does not provide any factual basis for its assumption that plaintiff's exposure was "unusual." Indeed, a 1981 study for the United States Department of Labor by a leading researcher on asbestos and health estimated that more than 21 million living American workers had been "significantly exposed" to asbestos during the previous 40 years. Irving J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* xiv (1981); *see also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 & n.15 (5th Cir. 1985) (*en banc*) (discussing Selikoff study); *Eagle-Picher*, 481 So.2d at 528 & n.18 ("Millions of people have been exposed to asbestos"; permitting an action for fear of cancer without physical injury from asbestos "would likely devastate the court system as well as the defendant manufacturers"). The illogicality of the Second Circuit's standard is underscored by the fact that many persons exposed to asbestos never develop any asbestos-related disease.[7]

The Second Circuit's rejection of the *Schweitzer* rule also does violence to the FELA and general common law proscription against claim-splitting. Although not consid-

[7] *See In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1569-70 & n.10 (citing studies); *Doner*, 617 N.Y.S.2d at 566.

ered by the Second Circuit, the "single recovery" rule established under this Court's FELA jurisprudence is unavoidably implicated by the Second Circuit's decision. This Court has held that under FELA only one recovery may be had by an employee for an employer's wrongful act, and that the employee's right to recover is then extinguished. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931).

In the usual zone of danger case, no issue of claim-splitting arises: a plaintiff who escapes physical injury at the time of an accident or other traumatic event is not at risk of developing future physical injuries as a consequence of that event. His only possible claim is for emotional distress. In contrast, in asbestos exposure cases, a plaintiff may develop one or more asbestos-related injuries years after exposure. Under this Court's prior FELA decisions, if permitted to sue for emotional distress based on exposure alone, a plaintiff would be barred from a second suit if he should later develop an asbestos-related disease. *Cf., e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 410-12 (5th Cir.) (*en banc*) (Mississippi law) (under "single recovery" rule, a plaintiff suffering from one asbestos-related disease, such as asbestosis, may sue only once and must recover in that one suit damages for both his present disease and any other ailment that he is more likely than not to develop in the future), *cert. denied,* 478 U.S. 1022 (1986).

Although a number of jurisdictions have adopted a "separate disease" rule providing that asbestosis and cancer each constitute a separate cause of action even though arising from the same exposure to asbestos, *see, e.g., Eagle-Picher*, 481 So. 2d at 520, no court has permitted claim-splitting that would allow emotional distress claims to be pursued separate and apart from physical injury claims. Clearly, the better rule in asbestos cases is that adopted by

the overwhelming majority of courts, namely to restrict recovery for emotional distress to plaintiffs with actual physical injury caused by asbestos exposure.[8]

In sum, the Second Circuit's decision in this case directly conflicts with the Third Circuit's opinion in *Schweitzer* and the vast majority of common law cases. Moreover, the Second Circuit's decision conflicts with the fundamental policy considerations articulated by this Court in *Gottshall* and opens the courtroom door to tens of thousands (perhaps hundreds of thousands) of asymptomatic asbestos plaintiffs.

II. THE SECOND CIRCUIT MISINTERPRETED AND MISAPPLIED THE ZONE OF DANGER TEST ARTICULATED BY THIS COURT IN *GOTTSHALL*

Instead of adhering to the physical injury requirement set forth for asbestos cases in *Schweitzer*, the Second Circuit incorrectly ruled that plaintiff's exposure to asbestos met the zone of danger test, which this Court adopted in *Gottshall*. To reach this result, the Second Circuit abandoned all of the traditional requirements of the zone of danger test, namely, (i) an accident, near accident or other traumatic event, which (ii) subjects the plaintiff to a risk of *imminent* physical harm, (iii) causing fright and resultant emotional injury. The Second Circuit's ruling is fundamentally inconsistent with and impermissible under this Court's decision in *Gottshall*.

---

[8] The cases relied on by the Second Circuit do not support abandoning the physical injury requirement: *Hagerty v. L & L Marine Servs.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff suffered dizziness, leg cramps, and a stinging sensation in his extremities, which court found to be physical injuries); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. C.P. 1987) (plaintiff had a physical injury - asbestosis).

In *Gottshall*, this Court determined that purely emotional distress is compensable under FELA only if it falls under the common law "zone of danger" test. 114 S. Ct. at 2410-11. Under the zone of danger test, "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* This test, which provides an exception to the general common law rule allowing recovery for emotional distress only where the plaintiff has suffered a physical injury, arose in response to a special category of cases involving accidents and near accidents in which a plaintiff suffered fright and severe emotional distress. As courts recognized, the general rule arbitrarily denied recovery to a physically uninjured plaintiff while permitting the slightly injured plaintiff standing next to him to recover, even though the two had suffered the same fright and resultant emotional harm in a traumatic event. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982). Thus, the zone of danger test is based on the "realization that 'a near miss may be as frightening as a direct hit.'" *Gottshall*, 114 S. Ct. at 2406 (quoting Pearson, *supra*, at 488).

Courts have, however, defined specific boundaries to emotional distress claims under the zone of danger test so that every person who was ever frightened or claimed that his workplace was generally hazardous would not have a cause of action. The requirement that a plaintiff be within the zone of danger of imminent physical harm is ineluctably linked to recovery under the test; without such a risk of immediate harm, there can be no zone of danger.

Indeed, the early zone of danger cases cited by this Court in *Gottshall* make clear that the risk of imminent physical injury is an essential and defining element of the test; these cases all involve collisions or near collisions of trains, streetcars and carriages, or other sudden, traumatic events that caused fright, with resultant mental injury, to the plaintiffs. *See Gottshall*, 114 S. Ct. at 2406 & n.8. For example, in *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892), after a near collision of streetcars, a pregnant passenger was allowed to recover for fright and physical injuries resulting from fright. As the court explained,

> a *collision* seemed so *imminent*, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of *immediate* death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness.

Id. at 1034 (emphasis added).[9]

---

[9] The other early cases cited by this Court in *Gottshall*, 114 S. Ct. at 2406 n.8, involve similar circumstances: *Simone v. Rhode Island Co.*, 66 A. 202 (R.I. 1907) (streetcar collision caused plaintiff fright resulting in fainting, vomiting, insomnia, headache, physical pain, three months in bed, and nervous disorders and weakness up to time of trial); *Kimberley v. Howland*, 55 S.E. 778 (N.C. 1906) (blasting sent rock crashing through plaintiff's house, causing plaintiff fright, shock, near miscarriage, and nervous physical pain and suffering); *Gulf, C. & S. F. Ry. v. Hayter*, 54 S.W. 944 (Tex. 1900) (plaintiff in train collision could recover for fright and shock resulting in physical injury); *Mack v. South-Bound R. Co.*, 29 S.E. 905, 906 (S.C. 1898) (plaintiff "just barely escaped being struck by the locomotive and cars, and . . . owing to the great and imminent danger . . . was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick and suffered great mental anguish and physical pain"); *Pankopf v. Hinkley*, 123 N.W. 625 (Wis. 1909) (collision between car and horse-drawn carriage caused plaintiff severe fright and shock, and resultant miscarriage, severe pain and permanent injury to health); *Stewart v. Arkansas S. R. Co.*, 36 So. 676 (La. 1904) (fright from train accident resulted in plaintiff's suffering miscarriage and subsequent ill health); *Watson v. Dilts*, 89 N.W. 1068 (Iowa 1902) (plaintiff suffered shock, fright, apprehension for her own life, prostration, nervous paralysis, and great mental and physical pain when defendant broke into home and assaulted husband).

Nor have more recent cases expanded the boundaries of the zone of danger test. Such cases allow recovery only for fright and attendant emotional distress caused by danger of immediate physical injury from an accident or other sudden, traumatic event. For example, in *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709, 714 (Del. 1965), cited by this Court in *Gottshall*, 114 S. Ct. at 2406 n.9, the Delaware Supreme Court adopted the zone of danger test to permit recovery for fright and emotional distress in a case where a plaintiff fled uninjured from her car seconds before the car was hit by a train.[10]

---

[10] Also cited by this Court in *Gottshall* were *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (*en banc*) (car accident); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (explosion); *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983) (escalator accident); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984) (automobile accident); *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985) (plaintiff in a group of children chased by police car). Conversely, the other recent zone of danger cases cited by this Court in *Gottshall* disallow recovery where the plaintiff was not at risk of, and did not fear, immediate physical injury: *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (*en banc*); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Ctr.*,

So, too, in FELA cases both before and after this Court's decision in *Gottshall*, the zone of danger test has been restricted to claims arising out of sudden accidents or other traumatic events that present a danger of immediate physical injury, causing fright and severe emotional distress. For example, in *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994), the court held that, under FELA and *Gottshall*, the zone of danger concept requires that plaintiff "was subject to a reasonable fear of *immediate* personal injury" (emphasis added). Accordingly, plaintiff was not in a zone of danger by virtue of the proximity of a worker who had on occasion punched other workers. The court emphasized that the "threat of injury" to the plaintiff "was not immediate," but rather was "both speculative and remote." *Id.* at 434; *see also Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 783 (Ohio 1995) (plaintiff was in zone of danger because he was threatened with a chipping hammer and nearly run over with a truck by fellow employees, and thus placed in risk of immediate harm), *cert. denied*, 116 S. Ct. 776 (1996); *Grube v. Union Pac. R.R.*, 886 P.2d 845, 851 (Kan. 1994) ("fear for one's safety is an essential element of the zone of danger test and must be expressed at or near the time of the danger"); *Garcia v. Burlington N. R.R.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is at 'immediate risk of physical harm'") (citation omitted).[11]

---

850 P.2d 1179 (Utah 1992); *Jobin v. McQuillen*, 609 A.2d 990 (Vt. 1992).

[11] *See also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78 (3d Cir. 1991); *Gillman v. Burlington N. R.R.*, 878 F.2d 1020, 1023 (7th Cir. 1989); *Wilson v. Consolidated Rail Corp.*, 810 F. Supp. 411, 416 (N.D.N.Y. 1993); *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436, 442 (E.D. La. 1993) (Jones Act); *Crooks v. Metro-North Commuter R.R.*, No. 93 Civ. 6030 (JSM), 1994 WL 719683 at *2

Contrary to the Second Circuit's holding, the zone of danger test simply does not apply to this fear of disease case. Plaintiff is not complaining about a "near miss" accident or other traumatic event that he witnessed or experienced. Nor does plaintiff allege that his workplace exposure to asbestos placed him in danger of immediate personal injury or that he suffered fright. On the contrary, by its very terms, plaintiff's claim urges the antithesis of a risk of immediate harm: he bases his claim on an alleged risk of injury that may occur at some indefinite time in the future. As such, plaintiff's claim falls well outside the boundaries of the "zone of danger" test.

Indeed, not only is the Second Circuit alone in applying the zone of danger test in asbestos litigation, but other courts have expressly declined to do so. As the court in *Nutt v. A.C. & S., Inc.*, 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984), stated, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased . . . [t]he nature of the asbestos related injury, whether considered on an exposure or a manifestation basis, is clearly incompatible with the traumatic event requirement for recovery of mental anguish under [the zone of danger test]." 466 A.2d at 25; *see also Wisniewski*, 759 F.2d at 273-74 (Pennsylvania law) (rejecting argument of uninjured asbestos plaintiffs that zone of danger test allowed recovery for emotional distress).

Similarly, the Fifth Circuit rejected a plaintiff's argument that recovery for mental anguish allegedly caused by asbestos exposure was permitted under Louisiana's "ordeal"

(S.D.N.Y. Dec. 28, 1994); *Bianco v. Philadelphia, Bethlehem & New England R.R.*, No. Civ. A. 93-4828, 1995 WL 89036, at *3 (E.D. Pa. Mar. 2, 1995); *Dziegelewski v. Consolidated Rail Corp.*, No. 93 Civ. 2666 (MBM), 1995 WL 63155 at *2 (S.D.N.Y. Feb. 15, 1995).

rule, which is essentially equivalent to the zone of danger test.[12] *See Adams v. Johns-Manville Sales Corp.*, 783 F.2d at 592-93. The Fifth Circuit explained that while the Louisiana cases "allowed recovery for mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," such cases did not recognize any right of recovery for mental anguish arising from fear of future complications from asbestos exposure where plaintiff had not proved that he had sustained any present injury from such exposure. *Id.* at 593.

The Second Circuit's conclusion to the contrary turns upon its determination that plaintiff suffered a "physical impact," namely, exposure to asbestos. (A-19) In ruling that plaintiff could recover on this basis, the Second Circuit incorrectly treats physical impact as a basis for recovery separate and apart from the requirement that plaintiff have been within the zone of danger.

The Second Circuit's error derives from its misunderstanding of certain language in *Gottshall* describing the zone of danger test as "limit[ing] recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 114 S. Ct. at 2406. With respect to the zone of danger requirement, this is not, as the Second Circuit appears to have concluded, a disjunctive test; on the contrary, in the very next sentence, this Court explained precisely what it meant: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* (citation omitted).

---

[12] In near-miss accident and other traumatic event cases, Louisiana's "ordeal" rule permits an uninjured plaintiff to recover for fright and mental anguish. *See Adams*, 783 F.2d at 593 (citing, *e.g.*, *Carroll v. State Farm Ins. Co.*, 427 So. 2d 24 (La. Ct. App. 1983)).

Stated simply, there exists no separate test under *Gottshall* which permits a FELA plaintiff to recover for negligent infliction of emotional distress whenever that plaintiff can demonstrate some sort of "physical impact," regardless of whether that plaintiff is in the zone of danger. Indeed, such an impact test was one of the "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress" that this Court considered in *Gottshall*. *See id.* This Court expressly declined to adopt such a test, rejecting it in favor of the zone of danger test. *See id.* at 2411.

Interpreting the zone of danger test, as the Second Circuit has done, to include a separate impact test that has nothing to do with the zone of danger and the concomitant risk of imminent harm would give rise to the absurd and much criticized results that led to the abandonment of the old "physical impact" test in the first place. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 363-6 (5th ed. 1984) (noting the expansion of the meaning of the "impact" test and observing: "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery.") (citation omitted). Although early cases under the old impact rule required a physical injury caused by an impact, gradually the impact rule was relaxed, as courts struggled to find a way to allow recovery in cases where an uninjured plaintiff had suffered great fright and emotional trauma from a near-miss accident. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). Thereafter, in some jurisdictions, the impact rule was further diluted so as to allow recovery in cases where there had been an impact of any kind no matter how slight, regardless of whether there had been an accident, a near accident, or a zone of danger. Finally, as Professors Prosser and Keeton observe, "[a] Georgia circus case reduced the matter to something of an absurdity by

finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." *See* Keeton *et al.*, *supra*, at 364. This is *not* the rule that this Court adopted in *Gottshall*. Rather, the zone of danger test, as adopted in *Gottshall*, removed the rationale for the diluted and arbitrary "physical impact" test by allowing both impacted and unimpacted plaintiffs to recover for emotional distress provided their distress arose from fright caused by the threat of imminent physical harm while in the zone of danger. *See Bloom*, 41 F.3d at 916 n.6.

In sum, under the prevailing principles of law and public policy articulated in *Gottshall* and other cases, the zone of danger test does not permit recovery under FELA for alleged emotional distress caused by exposure to asbestos. The Second Circuit's decision to the contrary is an unsound and erroneous expansion of liability.

III. THE SECOND CIRCUIT, IN CONTRAVENTION OF *GOTTSHALL*'S MANDATE, DISCARDED WELL-ESTABLISHED COMMON LAW LIMITATIONS ON RECOVERY FOR EMOTIONAL DISTRESS

In addition to its misapplication of the zone of danger test, the Second Circuit improperly discarded every other requirement imposed by the common law to place rational limits on liability for negligent infliction of emotional distress -- namely, that a plaintiff's emotional distress must result in a physical manifestation, be severe, and be substantiated by competent medical or psychiatric evidence.[13] Abandonment of these limitations creates an unprecedented expansion of liability for negligent infliction of emotional

[13] These issues were not, and need not have been, addressed in *Gottshall* because both plaintiffs clearly satisfied all three of these requirements. *See* 114 S. Ct. at 2400-02.

distress, a result that is in direct conflict with this Court's mandate in *Gottshall* to preserve common law limitations on recovery for such claims. As this Court observed in *Gottshall*, "[o]ur FELA cases require that we look to the common law . . . , and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 114 S. Ct. at 2411; *see also id.* at 2404 (common law principles "must play a significant role" and "are entitled to great weight" in analysis of negligent infliction of emotional distress under FELA).

A. The Second Circuit Erred in Holding That No Physical Manifestation of Emotional Distress Is Required

The Second Circuit declined to require that plaintiff's alleged emotional distress manifest itself in physical symptoms. (A-21) With this ruling, the Second Circuit contravened the "overwhelming weight of authority across the nation," which holds that to be compensable, emotional distress must result in "some physical manifestation." *See Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I. 1983).[14] Indeed, as this Court observed in *Atchison, Tope-*

[14] For other cases requiring physical manifestation, *see, e.g., Robb*, 210 A.2d at 714-715 (Del.); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944, 955 (Idaho 1980); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982); *State ex rel. Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. Ct. App. 1988); *Sears Roebuck & Co. v. Young*, 384 So. 2d 69, 71, 73 (Miss. 1980); *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965); *Melton v. Allen*, 580 P.2d 1019, 1021-22 (Or. 1978); *Reilly v. United States*, 547 A.2d 894, 896-97 (R.I. 1988); *Nelson v. WEB Water Dev. Ass'n, Inc.*, 507 N.W.2d 691, 699 (S.D. 1993); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92, 95 (Vt. 1980).

ka & Santa Fe Railway v. Buell, "[o]ne leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'" 480 U.S. 557, 569 n.18 (1987) (quoting Keeton *et al.*, *supra*, at 64); *see also Gottshall*, 114 S. Ct. at 2407 n.11.

The majority view that physical manifestation is required is also reflected in the Restatement (Second) of Torts, which states:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965).

Significantly, the requirement of physical manifestation was the prevailing rule under the common law at the time of FELA's enactment in 1908. *See* note 9, *supra*; *see also Gottshall*, 114 S. Ct. at 2410 (looking to "state of common law in 1908, when FELA was enacted" and noting "historical pedigree" of zone of danger test). In addition, contrary to the Second Circuit, courts in recent cases have specifically required a physical manifestation of emotional distress under FELA. *See Williams v. Carnival Cruise Lines*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995) (applying *Gottshall* and requiring that emotional distress be accompanied by "physical manifestation" under FELA and Jones Act); *Amendola*, 699 F. Supp. at 1410 (pre-*Gottshall*, requiring asbestos plaintiff under FELA to show physical harm either causing or caused by emotional distress); *cf. Ellenwood v. Exxon Shipping Co.*, 795 F. Supp. 31, 34-35 (D. Me. 1992) (in light of FELA and Jones Act case law,

requiring physical manifestation under general maritime law), *aff'd in relevant part*, 984 F.2d 1270 (1st Cir.), *cert. denied, 508 U.S. 981 (1993)*.

As these courts have recognized, the physical manifestation requirement furthers the fundamental policy concerns that this Court identified in *Gottshall* for imposing limitations on liability. *See Amendola*, 699 F. Supp. at 1411 (the physical manifestation test "will serve to limit trivial, frivolous, or premature claims" under FELA). The Restatement also emphasizes these policy concerns:

> [E]motional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants.

Restatement (Second) of Torts § 436A, cmt. b (1965).

In sum, absent a requirement of physical manifestation, a defendant's liability for claims of emotional distress under FELA would be unpredictable and nearly infinite -- the very result the common law limitations on emotional distress claims were designed to avoid. *See Gottshall*, 114 S. Ct. at 2408-09.

B. The Second Circuit Incorrectly Held That Emotional Distress Is Compensable Even If It Is Not Severe

The Second Circuit also departed from well-settled common law principles in holding that plaintiff could recover for emotional distress that, as the Second Circuit acknowledged, was not severe. (A-25) Contrary to the Second Circuit's holding, courts have overwhelmingly ruled that there can be no recovery for the negligent infliction of emotional distress if the distress is not severe. As this

Court observed in *Buell*, 480 U.S. at 567 n.13, "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *See also Roberts v. Saylor*, 637 P.2d 1175, 1180 (Kan. 1981) ("it is only when emotional distress is extreme that possible liability arises"); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (requiring a "high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment or anger").[15] In fact, Metro-North has found no case that supports the Second Circuit's claim that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact."[16] (A-24)

Numerous courts and commentators have noted that the severity requirement serves not only to guarantee the genu-

---

[15] *Accord, e.g., Williams v. Baker*, 572 A.2d at 1068; *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981); *Robertson v. Geophysical Service, Inc.*, 469 So. 2d 22, 24 (La. Ct. App. 1985); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982); *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995); *Parrish v. Omaha Pub. Power Dist.*, 496 N.W.2d 914, 915 (Neb. 1993); *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chems. Co.*, 578 A.2d 1248, 1250 (N.J. Super. Ct. App. Div. 1990); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990); *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 442-43 & n.23 (Wis. 1994).

[16] The Second Circuit's reliance on two trial court decisions (A-24) is misplaced. *Lacy v. Cooper Hospital/University Med. Ctr.*, 745 F. Supp. 1029, 1035 (D.N.J. 1990), does not discuss physical impact or distinguish between severe and non-severe emotional distress, but rather applies a longstanding exception to the threshold physical injury requirement in cases where a corpse has been mishandled. *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987), involved a plaintiff who had an actual physical injury (asbestosis). Moreover, Restatement (Second) of Torts § 436A, cited by the Second Circuit, requires physical harm, not merely physical impact.

ineness of emotional distress claims, but also to limit the variability and unpredictability of awards for emotional distress and the unlimited liability that would result if relatively trivial emotional distress were compensable. *See, e.g., Parkway*, 901 S.W.2d at 443-44. Moreover, like the physical manifestation requirement, the severity requirement accords with the purposes of FELA. As this Court observed in *Gottshall*, the basic rationale for finding that emotional injury is an injury within the meaning of Section 1 of FELA was the recognition that "severe emotional injuries can be just as debilitating as physical injuries." 114 S. Ct. at 2408. It is within the purpose of the statute to compensate such injuries; it is not within the purpose of the statute to compensate non-severe emotional distress of the kind alleged by plaintiff in this case.

C. The Second Circuit Erred by Not Requiring Medical or Psychiatric Evidence of Emotional Distress

The Second Circuit overturned the trial court's finding that plaintiff presented no objective evidence of his emotional distress. (A-24 to A-25) To reach this result, the Second Circuit departed from the well-established common law rule imposing upon plaintiffs the burden of presenting some objective medical, psychiatric or clinical evidence of alleged emotional distress.[17] The rationale for this basic

---

[17] *See, e.g., Aurora v. Burlington N. R.R.*, 31 F.3d 724, 726 (8th Cir. 1994) (requiring proof of "medically significant" emotional distress; testimony by psychiatrist that plaintiff was "anxious and depressed" but did not need medication or follow up treatment was insufficient as a matter of law); *accord Kadans v. Citicorp Mortgage, Inc.*, 26 F.3d 131 (9th Cir. 1994) (unpublished, table; text at 1994 WL 242112, at *1) (Nevada law); *Silver v. Mendel*, 894 F.2d. 598, 607 n.19 (3d Cir. 1990), *cert denied*, 496 U.S. 926 (1990); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1406 (W.D. Mo. 1994); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (*en banc*); *Parrish*, 496 N.W.2d

evidentiary requirement is similar to the policy considerations discussed above which underlie the other common law requirements for negligent infliction of emotional distress. In particular, courts have observed that the requirement of medically provable and diagnosable mental distress defines an appropriate middle ground of liability, between the "Scylla of unlimited liability" which would result from a "broad definition of 'emotional harm' -- one which includes upset, anger, and grief" -- and the "Charybdis of no liability" which would result from a requirement of permanent mental damage. *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 n.4 (Mo. 1983) (*en banc*) (citation omitted).

In this case, the evidence cited by the Second Circuit indisputably does not meet the common law standard of proof. Plaintiff presented *no* medical or psychiatric evidence of emotional distress. He never consulted a psychiatrist, social worker, or counselor, (TR at 797-98), and his own expert testified that he did not display a level of concern warranting counseling. (TR at 549; A-8) Indeed, even the Second Circuit characterized the evidence it cited of plaintiff's emotional distress as "slim." (A-24) That evidence consisted of evidence that Metro-North employees complained about working conditions and of plaintiff's own conclusory allegations of fear and anger. (A-24) Such evidence does not constitute proof of emotional distress, much less the required objective medical or psychiatric proof.

---

at 915-16 (Neb.); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Law Div. 1995); *Leone v. Leewood Srv. Station*, 624 N.Y.S.2d 610, 613 (App. Div.), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995); *Muchow*, 435 N.W.2d at 923 (N.D.); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974-75 (Utah 1993).

There is no support in the common law to permit such a totally unverified claim of emotional distress to go to a jury. Moreover, under Section 1 of FELA, a compensable injury is a mandatory statutory element of a cognizable claim, and it is an element which plaintiff must prove. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *3. The Second Circuit has effectively removed the need not only for objective medical or psychiatric proof of emotional injury, but the need for any objective evidence whatsoever.[18] Under the Second Circuit's standard, a plaintiff's conclusory allegations of the most trivial and transitory distress will suffice to establish a compensa-ble emotional injury. The Second Circuit's ruling is contrary to well-settled common law principles and common sense and warrants reversal by this Court.

IV. THE SECOND CIRCUIT ERRED IN ALLOWING AN ASYMPTOMATIC PLAINTIFF TO RECOVER MEDICAL MONITORING DAMAGES, IN DIRECT CONFLICT WITH FELA'S STATUTORY "INJURY" REQUIREMENT

The Second Circuit determined that plaintiff's separate claim for medical monitoring damages was cognizable under FELA "despite the fact that he has yet to suffer an asbestos-related disease." (A-26) This conclusion is directly contrary to the express language of the statute, which requires an injury as the basis for recovery. FELA pro-

---

[18] In refusing to require objective medical, psychiatric or clinical evidence, the Second Circuit inappropriately relied on civil rights cases under 42 U.S.C. § 1983. In such civil rights cases, an independent constitutional tort, with an injury such as job discrimination or false imprisonment, serves as the basis for awarding emotional distress damages flowing from the tort. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994) (citing *Carey v. Piphus*, 435 U.S. 247 (1978)); *Miner v. City of Glen Falls*, 999 F.2d 655, 662 (2d Cir. 1993). No such independent tort exists in this case.

vides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering . . . *injury* or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added). The Second Circuit ignored the dispositive fact that, under the applicable caselaw of this Court, plaintiff in this case suffered no "injury" that could serve as the statutory -- and factual -- basis for his claim for medical monitoring damages.

In *Urie v. Thompson*, 337 U.S. 163 (1949), this Court held that under FELA a worker exposed to a potentially harmful substance is not "injured," and thus may not be deemed to have a cause of action, until and unless "the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170; *see also Schweitzer*, 758 F.2d at 942. Here, the accumulated effects of plaintiff's asbestos exposure have not manifested themselves in any way; indeed, plaintiff is totally asymptomatic. Therefore, plaintiff suffers from no cognizable injury to support a medical monitoring claim under FELA. *See Batko v. Ogilvie*, 1986 WL 5761, at *1, *3 (under FELA, denying claims for future medical costs where plaintiffs had been exposed to asbestos but had no injury).[19]

Even if one assumes *arguendo* that plaintiff in this case suffered an emotional injury compensable under FELA, the medical monitoring damages plaintiff seeks to recover have no factual nexus to that injury. Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may later develop an asbestos-related disease. Therefore,

[19] None of the medical monitoring cases cited by the Second Circuit arises under FELA or any other statute imposing a comparable "injury" requirement.

his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

Moreover, by allowing medical monitoring damages in the absence of any physical injury, the Second Circuit embraced a novel theory of damages that is contrary to traditional common law principles and, indeed, has been recognized in only a small minority of jurisdictions. In so doing, the Second Circuit improperly disregarded the fundamental policy considerations for limiting liability that this Court identified in *Gottshall*. Such policy concerns have been cited by courts in denying recovery under state common law for medical monitoring in the absence of physical injury. As one court observed:

> [t]here is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

Ball v. Joy Mfg. Co., 755 F. Supp. at 1372.[20] Furthermore, allowing uninjured plaintiffs to bring causes of action for medical monitoring will consume scarce judicial resources, postponing recovery for the injured. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 575-76 (1992) ("As between the claims of the already impaired and the claims of those who are not now (and may never become) sick, . . . society should accord higher priority to the former.").

[20] *See also Thomas v. FAG Bearings*, 846 F. Supp. at 1410 (same); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *51-52 (W.D.N.C. Oct. 29, 1990).

Ultimately, however, in this case, it is not up to the Second Circuit or even this Court to resolve the policy questions raised by the medical monitoring claim asserted by this totally asymptomatic plaintiff. The statute is clear: such a cause of action is not permitted under FELA in the absence of a present injury. The courts may not rewrite the statute; it is up to Congress, if it desires to do so, to change the law to permit such a cause of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Sheila L. Birnbaum*
Barbara Wrubel
Douglas W. Dunham
Ellen P. Quackenbos
**Counsel of Record*

Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 735-3000

Richard K. Bernard
Metro-North Commuter
Railroad Company
347 Madison Avenue
New York, New York 10017
Of Counsel

APPENDICES

APPENDIX A -- DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 13, 1995

MICHAEL BUCKLEY, Plaintiff,

v.

METRO-NORTH COMMUTER RAILROAD, Defendant.

No. 89 Civ. 7170-A(WK).

United States District Court,

S.D. New York

March 13, 1995.

WHITMAN KNAPP, Senior District Judge.

This is a case brought under the Federal Employers Liability Act ("FELA") by one of the "snowmen of Grand Central Terminal" for negligent infliction of emotional distress caused by defendant Metro-North's negligent exposure of plaintiff to asbestos from June of 1985 to early September, 1987. Because defendant had conceded negligence, the only issues at trial were causation and damage. At the close of plaintiff's case, defendant moved for a directed verdict. Because we find that plaintiff failed to prove that he had sufficient impact with asbestos to result in a reasonable fear of developing an asbestos-related disease; and because he failed to prove that he had suffered a real emotional injury, we grant defendant's motion and direct a verdict in its favor.

Statement of the Facts

Drawing all reasonable inferences in plaintiff's favor, the relevant facts are as follows: Plaintiff Michael Buckley is a 39-year-old pipefitter who has worked for Metro-North at Grand Central Terminal since 1985. When Buckley was first hired as a pipefitter, Metro-North ordered him to work in the network of steam tunnels that run beneath Grand Central Terminal. There are miles and miles of pipes in those tunnels, covered with white insulation.

As a pipefitter, Buckley was assigned to repair and maintain these pipes. To do so, Buckley would have to remove the old white insulation from the pipe he was working on. He would take whatever tools he had available--a hammer, axe, wire shears--and pound the insulation away from the area where he had to work. As he did so, the insulation would break apart and fall to the floor. Buckley would kick it aside to get it out of his way, releasing clouds of white insulation dust into the air. He would become covered with this dust--it would get into his hair, his face, his mouth, his nose, his clothes. He would come up from the steam tunnels literally covered from head to toe with white insulation dust. Thus the nickname "snowman of Grand Central."

Most of this white insulation dust was asbestos, a known cancer-causing substance. Over a three-year period, from June of 1985 to June of 1988, Buckley worked on average for one hour a day actually removing and handling this insulation. Metro-North admits that it knew asbestos was present in Grand Central Terminal and that it knew of the hazard that working with and around asbestos posed to the health of its employees. It admits that it negligently exposed plaintiff to asbestos from June 1985 until early September of 1987. Metro-North admits that during this period it did not warn plaintiff that he was being exposed to asbestos, nor did it provide training for him on how safely to handle asbestos.

On August 31, 1987, Metro-North sent Buckley and his co-workers to an all-day asbestos awareness class. There, Buckley was told that the insulation he had been working with was asbestos, and that asbestos exposure causes painfully deadly diseases such as lung cancer, mesothelioma and asbestosis. At that class, Buckley was shown how to remove asbestos insulation, and was given a half-face respirator that was not fit-tested. He was also shown two videotapes: one of men lying in hospital beds gasping painfully for air as they slowly died from asbestos disease; and another that indicated that smoking contributed to the risk of developing lung cancer, and that smokers who work with asbestos could cut their risk of developing cancer by a significant amount if they quit smoking. Buckley has a history of smoking about a pack a day since he was seventeen. In 1991, Buckley cut down to an average of one cigarette a day, which is what he now smokes.

Subsequent to learning about his exposure to and the dangers of asbestos, Buckley contacted the law firm of Cahill, Goetsch and DiPersia, which he retained to represent him in this law suit. In 1990 and again in 1994, one of the lawyers sent him to the Mount Sinai Occupational and Environmental Health Clinic. There, he was examined by Dr. Steven Markowitz, who gave expert testimony that as a result of Buckley's exposure to asbestos, he has a 1 to 3 percent increased risk of dying from asbestos-related cancer, and a 10 percent increased risk of developing scarring of the lining of the lungs. He further testified that it takes 20 to 40 years for clinical signs of asbestos disease to develop, and that Buckley currently showed no physical signs of asbestos exposure. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related disease. Another professor from Mount Sinai, Dr. William Nicholson, also examined Buckley and testified that Buckley's risk of dying from cancer as a result of his

asbestos exposure has been increased by between 1 and 5 percent.

Buckley brought this law suit seeking the cost of his past and future medical monitoring expenses and for negligently inflicted emotional distress, consisting of loss of peace of mind, anxiety, fear of the future, anger, worry and distress due to his increased risk of dying from cancer.

Physical Impact

Taking all the facts plaintiff alleged as true, there is not sufficient evidence to allow a jury to find that plaintiff has had the requisite physical impact or fear of physical impact to warrant a finding of negligent infliction of emotional distress. On this question, there is no categorical authority. Rather, there are a number of guideposts. The most recent and authoritative of these is the Supreme Court's July, 1994 opinion, *Consolidated Rail Corporation v. Gottshall* 114 S.Ct. 2396, in which the Court established that negligent infliction of emotional distress is an action cognizable under the Federal Employers' Liability Act ("FELA"). In so holding, however, the Court indicated its concern that "recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* at 2405.

To avoid such a result, the Court placed "substantial limitations on the class of plaintiffs that may recover for emotional injuries, and on the injuries that may be compensable." *Id.* at 2405. The Court indicated that one such limitation would be the common law "zone of danger" test:

> Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for

> injuries--physical and emotional--caused by negligent conduct of their employers that threatens them imminently with physical impact."

Id. at 2410.

The Second Circuit followed *Gottshall* in *Marchica v. Long Island Railroad Co.* (2d. Cir. 1994) 31 F.3d 1197. In that case, the court found that a railroad employee whose finger had been penetrated by a needle and subsequently suffered a fear of contracting the AIDS virus could recover on a claim of negligent infliction of emotional distress. In so holding, the court reasoned that plaintiff had met the *Gottshall* "zone of danger" test because plaintiff had actually suffered a physical injury: a hypodermic needle had penetrated his body. The court went on to note, however, that "had Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204.

Clearly, the Second Circuit was mindful of the Supreme Court's concern of creating infinite liability for defendants. Much of the opinion focuses on various means of assessing the genuineness of a claim for negligent infliction of emotional distress absent a physical injury. In such a case, where no physical injury has occurred, the court suggested that proof of exposure to a contaminated substance was a "substitute means for providing a guarantee of the merits of a plaintiff's claim." *Id.* at 1204. Only with such evidence of exposure can plaintiff show that fear of developing a disease related to the contaminated substance is reasonable. Relying on other "fear-of-developing-disease" cases, the court adopts the proposition that "the exposure requirement--plus actual likelihood of developing the disease-- ... is a means of ensuring the genuineness of the claim." *Id.* at 1205. *See also Doner v. Admans Contracting Inc.* (A.D. 3 Dep't. 1994) 617 N.Y.S.2d 565, 566 ("Mental anxiety occasioned by the

fear of developing a disease is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent ... and a likelihood of contracting the disease as a result").

The case at bar, like that envisioned by the *Marchica* court, is "on very different footing." Here, there was no physical injury analogous to being pricked by a hypodermic needle. Therefore, we must consider the Second Circuit's other means of assessing the genuineness of plaintiff's claim: whether plaintiff can show proof of exposure to asbestos such that there was a sufficient likelihood of contracting a disease to make plaintiff's fear reasonable. On the present record, he has made no such showing.

There is plenty of evidence in this case that plaintiff was around asbestos, even touched by asbestos. But there is no proof, assuming that he had occasionally inhaled asbestos, that he inhaled inhaled enough to create a reasonable fear of developing an asbestos-related disease.[1] Plaintiff's own expert, Dr. Nicholson indicated that determining an individual's actual exposure to asbestos is "fraught with difficulties because it depends upon individual sensitivity and the uncertainties of the time course of the individual's exposure." (469-70). This is hardly evidence of actual exposure and actual likelihood of developing a disease. Thus there is no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable.

The Supreme Court and the Second Circuit are unequivocal in holding that these tests to determine the genuineness of plaintiff's claim must be met. In the case at bar, plaintiff does not fall within the zone of danger as envisioned by the

---

[1] For the purposes of this case, "exposure" to asbestos should be understood to mean "inhalation" of asbestos, for it is only inhalation that leads to asbestos-related disease.

Supreme Court or the Second Circuit: he has not sustained a physical injury; and he offered no evidence to establish that he was sufficiently exposed to asbestos to create a reasonable fear of developing an asbestos-related disease. Thus the claim fails as a matter of law.

Emotional Injury

Even if plaintiff had been able to establish that he fell within *Gottshall's* zone of danger, he did not offer sufficient evidence to allow a jury to find that he suffered a real emotional injury.

On this question, no specific form of proof, such as medical testimony, is required. However, the cases dealing with the subject tell us is that there is need for some objective evidence, apart from the plaintiff's own testimony concerning his or her own supposed agony. For example, in *Miner v. City of Glens Falls* (2d. Cir. 1993) 999 F.2d 655, plaintiff was a police officer who lost his job, allegedly without due process. The court found that plaintiff could recover on a claim for negligent infliction of emotional distress because in addition to plaintiff's own testimony of feeling inadequate, embarrassed, anxious and exasperated to such a degree that he contemplated suicide, the court found that

> the anguish he described has some objective correlation with events described by [plaintiff] and by his wife: loss of their house, family tensions, certain potentially demeaning aspects of a former police officer having to seek benefits.

Id. at 663.

Plaintiff in the case at bar provides no analogous objective evidence. Despite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any

one of several asbestos-free facilities where both he and his father had previously worked. Moreover, even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes "whenever I feel like having one." (773). The only objective fact to which plaintiff testified was that he lost his temper more frequently with his wife, but even that he conceded was related in part to the instant law suit. Moreover, unlike the situation in *Miner*, his wife gave no testimony in support of this claim.[2]

Dr. Markowitz, who examined plaintiff for almost two hours and was trained in psychology, did not refer plaintiff either to a psychologist or to a social worker. When asked by the Court why he did not make such a referral, he responded that "if [plaintiff] had displayed that level of concern to me I might have considered [referring him to a counselor]. I might have said, well, you ought to get some counseling about this. But I didn't see it." (549)[3]

Thus, because plaintiff has offered no objective evidence by which a jury could determine that he had suffered a real emotional injury, his claim for negligent infliction of emotional distress must also be dismissed.

SO ORDERED.
New York, New York
March 13, 1995

---

[2] Plaintiff testified that following the asbestos awareness class in late 1987, he had expressed his anger and concern over what had happened to him by complaining to his Metro-North foremen, supervisors, superintendents, and ultimately to the MTA Inspector General's Office. However, as with the evidence concerning plaintiff's arguments with his wife, no corroborative testimony was offered.

[3] this response was given to a question posed out of the presence of the jury, but is nonetheless part of the record.

APPENDIX B -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 1, 1996

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 608 -- August Term, 1995

(Argued: December 8, 1995 Decided: April 1, 1996)

Michael BUCKLEY,

Plaintiff-Appellant,

v.

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellee.

Before:

FEINBERG and OAKES,

Circuit Judges.[1]

---

[1] Honorable Guido Calabresi, C.J., heard oral argument but later disqualified himself and did not participate in the decision of this court.

Appeal from the judgment as a matter of law granted by the United States Court for the Southern District of New York, Whitman Knapp, Senior Judge, in favor of Appellee on Appellant's claims for negligent infliction of emotional distress and medical monitoring arising under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994).

Vacated and remanded.

Charles C. Goetsch, New Haven, CT
(Cahill Goetsch & DiPersia, P.C., of counsel),
for Plaintiff-Appellant.

William G. Ballaine, New York, NY
(Mark S. Landman, Lisa S. Rabinowitz,
Ann Marie Collins, Siff Rosen P.C., of counsel),
for Defendant-Appellee.

OAKES, *Senior Circuit Judge*:

Michael Buckley ("Buckley") appeals from the judgment as a matter of law granted by the United States District Court for the Southern District of New York, Whitman Knapp, *Senior Judge*, in favor of Metro-North Commuter Railroad ("Metro-North"). Buckley claims negligent infliction of emotional distress and medical monitoring costs arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994) ("FELA"), for asbestos exposure Buckley suffered while working as a Metro-North pipe fitter in Grand Central Terminal. Buckley claims the district court erred in refusing to submit his negligent infliction of emotional distress claim to the jury and in failing to address his claim for medical monitoring. For the reasons stated below, we vacate and remand.

BACKGROUND

In reviewing the district court's judgment as a matter of law in favor of Metro-North, we consider the facts in the light most favorable to Buckley, the non-moving party. *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir.1994).

Buckley, who is 41 years old, has worked for various railroad companies in different capacities since the early 1970s. In June 1985, he began to work for Metro-North as a pipe fitter, repairing and maintaining the labyrinth of pipes in the steam tunnels of Grand Central Terminal in New York City. These pipes were covered with a white insulation material that Buckley and the other pipe fitters needed to remove before performing any repair or maintenance work. Buckley would hammer, cut, and pull the insulation material, using any tools on hand, in order to expose the pipe. The insulation, a dry, dusty sort of material, would break apart as it was removed, scattering particles into the air--"just like taking baby powder and shaking it," as Buckley said. Fans used to make bearable the intense heat of the steam tunnels would further spread dust from the pieces of insulation that accumulated on the floors of the tunnels. During the work day, this dust would cover Buckley's skin and clothes and enter his nose and mouth, so that he could taste the chalky insulation material. Because Buckley and the other pipe fitters would emerge from their daily duties in the tunnels covered head to toe with white powder, they were dubbed the "snowmen of Grand Central."

The insulation material that Buckley was exposed to during his work day for roughly three years was asbestos, widely recognized as a carcinogen since the mid-1970s. Metro-North admitted that it knew the insulation was composed of asbestos and that asbestos can cause cancer. In fact, Metro-North had been cited for asbestos-related violations in September 1986 following a fire in Grand Central Terminal. Metro-North further admitted that, despite its

knowledge of the problem, it did not warn Buckley that the substance covering him when he emerged from the tunnels was asbestos, nor did it train him regarding safe handling of asbestos.

On August 31, 1987, nearly a year after the fire and the asbestos citations, Metro-North finally required that pipe fitters attend an asbestos awareness class. At this class, Buckley learned of the asbestos in the pipe insulation. He was told that asbestos is a substance that can cause painful, debilitating, and often deadly disease such as asbestosis, lung cancer, and mesothelioma, a cancer of the pleura that lines the outside of the lungs. He viewed videotapes depicting people suffering from these diseases. He received instruction on asbestos removal by the "glove bag" method and was given a half-face respirator. The respirator, however, was not fit-tested. He was also shown a video that explained that smoking increases one's risk of lung cancer, and that smokers exposed to asbestos can decrease their risk of lung cancer if they quit smoking.

Buckley attempted to use the half-face respirator at work, but it fit poorly and slid down his face as he perspired in the intense heat of the steam tunnels. He also attempted to use the glove bag method of removal, but the plastic bags used to isolate the asbestos during the procedure would melt on the hot pipes after the insulation was removed, spilling out the asbestos that was supposed to be safely contained in the bags. In 1991, Buckley, who had smoked heavily since he was seventeen, cut down his smoking to an average of one cigarette a day.

After learning of the asbestos in the insulation, the pipe fitters wrangled with Metro-North over the issue of safety. They also contacted the White Lung Association, an advocacy group for victims of asbestos exposure, to inform themselves about the hazards of asbestos. When their complaints to Metro-North management went unresolved, the

workers contacted the Office of the New York State Attorney General, which investigated Metro-North in conjunction with the Inspector General of the Metropolitan Transit Authority. Because he "wanted Metro-North to be held accountable for what they did," Buckley contacted a law firm to pursue a case against Metro-North, as did as many as 140 other asbestos-exposed workers. Buckley's case was set up as a "test case" for the claims of all of the workers.

Buckley's attorney referred him to the Mount Sinai Occupational and Environmental Health Clinic for a medical evaluation. He was examined by Dr. Steven Markowitz and Dr. William Nicholson, who both testified as experts at trial. The doctors noted that Buckley currently showed no signs of asbestos-related diseases, but explained that the latency period for these diseases is not less than ten years and commonly ranges between 20-40 years. The doctors stated that Buckley was exposed to extremely high levels of asbestos as a pipe fitter for Metro-North, and agreed that, as a result of the asbestos exposure, Buckley suffered an increased risk of dying from an asbestos-related cancer. Dr. Markowitz characterized the increased risk as "significant," and, when pressed, quantified the increased risk as one to three percent. Dr. Nicholson quantified the increased risk as one to five percent, and stated that in his opinion there was a reasonable scientific basis to fear that Buckley will develop an asbestos-related cancer. Dr. Markowitz further noted that Buckley suffers a ten percent higher risk of developing scarring of the lining of the lungs due to on-the-job asbestos exposure.

Dr. Markowitz pointed out that Buckley's exposure could not be documented by x-ray until scarring developed, and a biopsy of the lungs could not be conducted because live tissue samples are not performed until disease has developed. In Dr. Markowitz's opinion, though, while working with the dry, chalky insulation, Buckley inhaled a great deal of thin,

needle-like asbestos fibers that have lodged in Buckley's lungs and could create grave health problems later in life. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related diseases, noting that early detection of some of these diseases, such as lung cancer, could improve Buckley's prognosis.

Buckley testified that he is fearful of developing an asbestos-related disease. He is angry at Metro-North and no longer trusts his employer to provide a safe workplace. He said that because of the asbestos exposure he worries about his future, becomes upset when he sees media reports about asbestos, and is overprotective of his young son. He has not, however, undergone any psychiatric treatment for his fears. As he stated, "[w]hat is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?"

After denying Metro-North's motion to dismiss, the district court directed that the case proceed to trial. *See Giammona v. Metro-North Commuter R.R.*, 750 F. Supp. 662 (S.D.N.Y. 1990). In 1994, Buckley became the test plaintiff for the claims of all the exposed employees, and a jury trial commenced in February 1995. Because Metro-North conceded negligence, only the issues of causation and damages were placed before the jury. At the close of Buckley's case, and before Metro-North commenced its case, Metro-North filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court granted Metro-North's motion and dismissed the jury.

DISCUSSION

Buckley contends the district court erred when it entered a judgment as a matter of law in favor of Metro-North at the close of Buckley's case. He asserts that his claim of negligent infliction of emotional distress and his claim for medical monitoring costs should have been submitted to the jury.

A district court may grant a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 only if no reasonable jury could find for the non-moving party. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993). There must be "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Id.* (quoting *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 168 (2d Cir. 1980)). In examining a motion for judgment as a matter of law, the court "must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." *Purgess*, 33 F.3d at 140.

In reviewing a judgment as a matter of law, we apply the same standard as the district court. *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 52 F.3d 1124, 1131 (2d Cir. 1995). Here, we must determine whether the district court correctly concluded that no reasonable jury could have found for Buckley on his claim of negligent infliction of emotional distress under FELA.

Section 1 of FELA, 15 U.S.C. § 51 (1994), states:

> Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

Congress designed FELA as a "broad remedial statute" for railroad workers injured on the job because of employer negligence. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563 (1987). As the Supreme Court has noted, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Id.* at 561, 107 S.Ct. at 1413. However, "[o]nly to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law.' " *Consolidated Rail Corp. v. Gottshall*, ___ U.S. ___, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994) (quoting *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958)). In other respects, the common law retains "great weight" in any judicial consideration. *Id.*

By the plain language of the statute, a "common carrier by railroad" is liable if one of its employee is injured due to the negligence of the common carrier. There is no dispute that Metro-North, a carrier by rails engaged in interstate commerce, employed Buckley. Furthermore, Metro-North has conceded negligence. Thus, this case turns upon whether Buckley's claim of emotional harm suffered as a result of Metro-North's negligence is an injury compensable under FELA.

I. Negligent Infliction of Emotional Distress

In *Gottshall,* the Court stated that "[b]ecause FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in [a court's] decision." *Id.* at 2404. The common law in nearly every state, the Court found, allows plaintiffs to bring claims for negligent infliction of emotional distress and therefore such claims are cognizable under FELA. *Id.* at 2405.

The Court recognized that because "[t]he incidence and severity of emotional injuries are ... more difficult to predict than those of typical physical injuries[,] ... negligent infliction of emotional distress [claims] hold [ ] out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* For this reason, the Court noted, the common law has sought to limit recovery for negligent infliction of emotional distress. Some jurisdictions allow recovery only to those whose emotional distress stemmed from a physical impact; others allow recovery to those who, though suffering no physical impact, were within the zone of danger; and still others allow recovery to those who, though not within the zone of danger, witnessed the death or severe injury of a relative. *See id.* at 2406-07.

The Court analyzed these common-law restrictions on negligent infliction of emotional distress claims and adopted the zone of danger test as a proper limitation on recovery, balancing the concern for predictable liability with the broad remedial nature of FELA. The Court found that a negligent infliction of emotional distress claim may be brought by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 2406, 2410.

Here, the district court found that Buckley did not fulfill the test for negligent infliction of emotional distress actions set forth in *Gottshall* because he did not suffer "sufficient impact with asbestos" to sustain a claim and "failed to prove that he had suffered a real emotional injury." We first address the district court's finding regarding physical impact and then turn to its finding regarding Buckley's emotional injury.

A. Physical Impact

As we noted above, a plaintiff may state a claim for negligent infliction of emotional distress only if the plaintiff suffers a physical impact or the defendant's conduct "threatens [the plaintiff] imminently with physical impact"--the zone of danger test. *Gottshall* at 2410.

We disagree with the district court's finding that Buckley did not suffer "sufficient impact with asbestos" to sustain a claim for negligent infliction of emotional distress. We hold that the district court erred in granting Metro-North a judgment as a matter of law because, from the evidence presented at trial, a reasonable jury could conclude that Buckley suffered a physical impact with asbestos.[1]

There is ample evidence in the record that the asbestos dust coated Buckley's skin and clothes, entering his nose, eyes, and mouth. Indeed, he could actually taste the chalky insulation material. When viewed in the light most favorable to Buckley, the evidence shows that he suffered a massive exposure to asbestos.[2] One need only visualize the image evoked by the pipe fitters' nickname--"the snowmen of Grand

---

[1] Buckley does not claim damages for increased risk of developing disease. In order to recover for an increased risk of disease, as opposed to negligent infliction of emotional distress based upon fear of disease, a plaintiff must show a physical impact and a probability that the disease will actually develop in the future. *See Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319-20 (5th Cir. 1986), *modified*, 797 F.2d 256 (5th Cir. 1986). The evidence in this case would not support such a claim, because Buckley cannot demonstrate a probability that he will develop an asbestos-related disease.

[2] We do not believe that Buckley's claim should be defeated because he cannot quantify the amount of asbestos to which he was exposed. The reason no tests of asbestos levels were performed during the period of exposure was that Metro-North did not wish to disclose the presence of asbestos and therefore did not conduct any such tests.

Central"--to understand the extent of Buckley's exposure to asbestos.

Furthermore, Buckley's expert witnesses testified that Buckley inhaled a large quantity of thin, needle-like asbestos fibers due to the work conditions imposed by Metro-North. When inhaled, asbestos fibers become imbedded in lung tissue and, according to Buckley's experts, cause subclinical changes to occur. Eventually, after ten to forty years, deadly and debilitating diseases may develop.

Metro-North argues that such exposure does not constitute an impact unless clinical signs of asbestos-related disease develop. Though both experts testified that Buckley's lungs had suffered subclinical changes, they admitted that Buckley had yet to display any verifiable clinical signs of asbestos exposure. However, the evidence Buckley presented showed that the absence of clinically verifiable proof is not dispositive. Given the strong evidence of massive exposure and the expert testimony regarding the likelihood of inhalation and its effect, we think a reasonable jury could find that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure. We cannot find as a matter of law that Buckley's injuries are not genuine simply because they are subcellular. The effect of asbestos in the lungs is a subtle, complex matter. It is for the jury, assisted by expert testimony, to determine whether Buckley has suffered present harm.

Our recent decision in *Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995), supports our conclusion that a reasonable jury could find that Buckley sustained a physical impact from his exposure to asbestos. In *Marchica*, we found that a railroad worker suffered a physical impact sufficient to recover for fear of contracting the AIDS virus when a discarded hypodermic needle stabbed the worker's hand while he was cleaning up an area of a railroad station

notorious as a haven for drug users. *Id.* at 1206. We held that, even though it was never determined that the AIDS virus was present in the needle, such an injury "would cause a reasonable person to develop a fear of AIDS." *Id.* We noted that "[h]ad Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204. The distinction between a stab wound and a touch rests upon the method by which the AIDS virus is transmitted. The AIDS virus cannot be contracted simply by touching: penetration and contact with body fluid is required. A fear of developing AIDS absent such contact would be unreasonable.

Similarly, the fear of developing an asbestos-related disease from an incidental contact with asbestos would be unreasonable. Asbestos, as the evidence at trial showed, exists in small quantities in the air we breathe each day and such low-level contacts do not in any way affect the vast majority of people. Buckley, however, does not claim that his fear arises from normal contact with asbestos in the ambient air. Rather, as Buckley's counsel explained, Buckley's fear stems from "exposure to hazardous amounts of asbestos for an average of one hour per day while actual[ly] removal[ing], handling and working [with] asbestos insulation ... during the period from June of 1985 to June of 1988." Buckley offered evidence that such an exposure causes a measurable increase in the possibility of his developing asbestos-related disease. Just like the needle puncture in *Marchica*, Buckley's three years of daily contact with the cancer-causing substance--contact that from time to time left him covered from head to toe in asbestos dust--constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer.

For this reason, we reject the FELA cases finding that asbestos fiber inhalation cannot constitute an injury. *See*

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *Amendola v. Kansas City So. Ry. Co.*, 699 F. Supp. 1401, 1403 n. 3, 1410-11 (W.D. Mo. 1988). While these cases express a concern over speculative or frivolous lawsuits, the Marchica case makes clear that the relevant inquiry is whether the impact would cause fear in a reasonable person. To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body. Given the evidence of Buckley's prolonged and pronounced exposure to asbestos, a jury may find that he suffered an impact that would cause fear in a reasonable person.

Metro-North urges us to follow those common law fear-of-disease cases holding that exposure to a carcinogen is not in and of itself enough to constitute a physical impact. It is true that many cases hold that a fear-of-disease plaintiff must prove both actual exposure to a disease and a reasonable medical probability of later developing a disease. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *Doner v. Ed Adams Contracting Inc.*, 208 A.D.2d 1072, 1072-73, 617 N.Y.S.2d 565, 566 (3d Dept. 1994) (though plaintiff could prove actual exposure to asbestos, plaintiff failed to show he was likely to contract a disease and thus could not prevail on emotional distress claim). Other courts insist a plaintiff prove the exposure caused a present physical injury, that a future disease will likely develop, or that the emotional injury has manifested itself physically. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (fear of asbestos disease not rational unless plaintiff experiences functional impairment); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378, 752 P.2d 28, 31 (Ct. App. 1987) (no cause of

action for fear of disease absent bodily injury); *Eagle-Picher Industries, Inc. v. Cox,* 481 So.2d 517, 527-28 (Fla. Dist. Ct. App. 1985) (same).

As we noted in *Marchica,* however, such cases are inapposite when, as here, a plaintiff's emotional distress results from an actual physical impact or injury. *See Marchica,* 31 F.3d at 1204.[3] Furthermore, many courts have found that under certain circumstances exposure to asbestos or other disease- causing agents may constitute an impact sufficient to sustain a claim for fear of disease. *See, e.g., Hagerty,* 788 F.2d at 318 n. 1 (seaman soaked with toxic chemicals suffered a "physical injury from the drenching which constitutes an impact"); *Wetherill v. University of Chicago,* 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (prenatal exposure to DES is a physical impact); *Lavelle v. Owens-Corning Fiberglas Corp.,* 30 Ohio Misc. 2d 11, 14, 507 N.E.2d 476, 480 (Com. Pl. 1987) (exposure to asbestos while working with insulation is a physical contact sufficient to allow fear of cancer claim to proceed). We choose to follow these cases and hold that a reasonable jury could find that Buckley suffered a physical impact.

We decline to narrow our view of physical impact in order to avoid the flood of litigation that Metro-North claims we will unleash by this decision. First, "a more flexible view" of physical impact is "most consistent with FELA's remedial nature." *Marchica,* 31 F.3d at 1206. Second, only a narrow class of plaintiffs may sue under FELA, *see Gottshall,* 114 S. Ct. at 2412 (Ginsburg, J., dissenting), and FELA protects this group of plaintiffs from the negligent acts of employers to a greater extent than the plaintiffs would be protected at common law. Third, even within the narrow class of FELA

---

[3] The terms "impact" and "injury" were used interchangeably by the *Marchica* court to describe the needle prick suffered by Marchica.

plaintiffs, Buckley and the other "snowmen" present what we believe is an unusual case, as Buckley's exposure to asbestos was massive, lengthy, and tangible. Finally, Metro-North has admitted that it negligently allowed the pipe fitters to perform their duties without any knowledge on their part of the presence of asbestos or any training in its proper handling. We do not believe that the magnitude of Metro-North's wrong should limit the damages awarded against it. Thus, taking all inferences in favor of Buckley, we find that a jury, presented with the evidence in this case, may find that Buckley suffered an impact that would cause fear in a reasonable person.

B. Emotional Injury

Even if a plaintiff suffers a physical impact that would cause fear in a reasonable person, the plaintiff will not be permitted to recover unless he or she actually suffers an emotional injury as a result of the physical impact. The district court held that no reasonable jury would find that Buckley suffered emotional distress. Because the district court believed that Buckley offered no corroborating evidence of his emotional distress, and because Buckley continued to smoke cigarettes after learning that smoking increases the risk to those exposed to asbestos, the court held that Buckley's claimed emotional distress was not serious enough to be compensable.

Though a plaintiff need not present medical proof of emotional distress, some *objective* proof apart from plaintiff's testimony must be offered in order for a jury to determine that the plaintiff suffered real emotional injury. *Miner v. City of Glens Falls,* 999 F.2d 655, 663 (2d Cir.1993). We disagree with the district court that there is a complete lack of objective proof in this case. Buckley testified that because of his fear and anger, he complained first to his supervisors and then to the Metropolitan Transit Authority Inspector General ("I.G.") about the asbestos in the tunnels. The

district court said Buckley failed to corroborate these complaints, but one worker who testified, Gregory Peck, stated that "we went to the I.G." when asked on cross-examination how he found out that "everything that [Metro-North] did was wrong." In addition, the joint report issued by the I.G. and the New York State Attorney General's Office, admitted into evidence, detailed the workers' complaints to supervisors and investigative bodies. This evidence, though slim, may provide substantiation of Buckley's claim.

Metro-North urges that regardless of whether Buckley provided any objective proof of emotional distress, he has not suffered emotional injury severe enough to sustain his claim. To permit an award for emotional distress arising out of a fear of cancer, a plaintiff must "introduce evidence of his particular fears with some specificity" and "as a threshold matter, present evidence of his particular fear of developing cancerous conditions." *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 858-59 (5th Cir. 1988). Buckley's testimony about his anger and fear of dying satisfies this burden. It appears from our review of case law that emotional distress must be "severe" only when a plaintiff has not suffered a physical impact. In such a case, the severity of the emotional distress serves to guarantee the genuineness of the claim. *See Lacy v. Cooper Hosp./Univ. Med. Ctr.*, 745 F. Supp. 1029, 1035-36 (D.N.J. 1990); *Lavelle*, 30 Ohio Misc.2d at 14-15, 507 N.E.2d at 480-81; *Restatement (Second) of Torts* § 436A (1965); *compare Restatement (Second)* § 46 (to prove *intentional* infliction of emotional distress, plaintiff's emotional distress must be "so severe that no reasonable [person] could be expected to endure it"). Here, as we discussed above, a reasonable jury could find that Buckley has suffered a physical impact. Buckley is therefore entitled to all damages flowing from the impact, including his reasonable emotional distress, so long as the jury finds based upon

Buckley's testimony and objective evidence that Buckley actually suffers from the fear and anger he claims.

We realize that the evidence of Buckley's emotional distress is not overwhelming. He does not suffer the sort of severe distress claimed by the plaintiff in *Marchica,* 31 F.3d at 1201, and there is not an abundance of evidence corroborating his claims. However, we do not believe that a jury need rely only upon "sheer surmise and conjecture," *Samuels,* 992 F.2d at 14, in order to find Buckley suffered emotional distress. Therefore, we find that the district court erred in granting Metro-North a judgment as a matter of law on Buckley's negligent infliction of emotional distress claim.

II. Medical Monitoring Costs

As a separate claim, Buckley seeks to recover for the cost of future medical monitoring. The district court failed to address this claim at all in its judgment as a matter of law in favor of Metro-North. We find that medical monitoring costs are a reasonable basis for an award of damages in this case. We believe that the evidence presented by Buckley could convince a reasonable jury to grant medical monitoring damages.

Dr. Markowitz testified that because of Buckley's exposure to asbestos, he is at an increased risk of developing an asbestos-related disease which will peak between the ages of fifty and sixty-five. Dr. Markowitz stated that because of this risk, Buckley should be provided with present and future medical monitoring in order to detect and treat the diseases as they may arise, including an annual medical exam with pulmonary function tests and chest x- rays. Beginning at age 45, Buckley should also undergo a sigmoidoscopy and stool tests every other year. Dr. Markowitz estimated the annualized cost of these tests at $950.00.

It is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of an

injury. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 90 (1935). We believe that Buckley should be compensated for such medical monitoring as is reasonably necessary according to contemporary medical principles applied by physicians experienced in the diagnosis and treatment of asbestos diseases. We agree with a number of other courts that such costs are

> a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure ... the toxicity of [asbestos], the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, ... surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.

Ayers v. Township of Jackson, 106 N.J. 557, 606, 525 A.2d 287, 312 (1987). We find that Buckley may recover such costs despite the fact that he has yet to suffer an asbestos-related disease. As one court has noted, "the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but rather whether medical monitoring is ... necessary in order to diagnose properly the warning signs of disease." *In re Paoli R.R. Yard PCB Litigation (Paoli I)*, 916 F.2d 829, 851 (3d Cir. 1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991). *See also Gibbs v. E.I. DuPont de Nemours & Co., Inc.*, 876 F. Supp. 475, 478 (W.D.N.Y. 1995) (citing *Paoli I* with approval); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 659, 566 N.Y.S.2d 1002, 1004 (Sup. Ct. 1991) (defendant liable for medical monitoring expenses incurred by plaintiff due to "invasion of the body by toxic substances through negligent exposure"); *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 137, 477 N.Y.S.2d 242, 247 (4th Dept. 1984) (medical monitoring

cost recoverable if plaintiff can establish to a reasonable degree of medical certainty that costs are "reasonably anticipated"); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1006-07, 25 Cal. Rptr.2d 550, 863 P.2d 795, 822-23 (1993) (even in the absence of physical injury, reasonably certain medical monitoring costs may be recovered). Given the expert testimony in this case regarding impact, increased risk, and the necessity of monitoring, a reasonable jury could award Buckley medical monitoring costs.

Any award should be limited to costs incurred as a direct result of Buckley's asbestos exposure, rather than as a result of his history of smoking. We agree with the Third Circuit that a plaintiff must:

> prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

In re Paoli R.R. Yard PCB Litigation (Paoli II), 35 F.3d 717, 788 (3d Cir. 1994) (quoting *Hansen v. CCI Mech.*, 858 P.2d 970, 980 (Utah 1993) (citations omitted)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995). Therefore, a jury may only award to Buckley damages for that medical monitoring which is necessary because of his exposure to asbestos.

Competent expert testimony in this case established both that Buckley suffered a substantial impact from asbestos that

has significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops. The costs of such tests are a traditional element of tort damages, and a reasonable jury may award them to Buckley in this case.

CONCLUSION

For the reasons stated above, we vacate the judgment as a matter of law entered in favor of Metro-North and remand this case to the district court for a jury trial.

APPENDIX C -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10 day of July one thousand nine hundred and ninety-six.

Buckley

Plaintiff-Appellant

v Dkt No. 95-7399

Metro-North Commuter

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Metro-North Commuter Railroad Company's.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By:

/s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX D -- RELEVANT STATUTES

UNITED STATES CODE

TITLE 45 -- RAILROADS

CHAPTER 2--LIABILITY FOR INJURIES TO EMPLOYEES

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries of employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for

the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.